

## ***5 Official Opinion of the Compliance Board 42 (2006)***

### **EXECUTIVE FUNCTION EXCLUSION – DISCUSSION OF LAW ENFORCEMENT MATTER BEYOND PUBLIC BODY’S JURISDICTION, HELD TO BE OUTSIDE THE EXCLUSION – NOTICE REQUIREMENTS – TIMING – NOTICE GIVEN PROMPTLY AFTER SCHEDULING OF SAME-DAY MEETING, HELD TO BE PERMITTED**

May 31, 2006

*Sveinn C. Storm*

The Open Meetings Compliance Board has considered your complaints against the Centreville Town Council. Your initial complaint alleged that the Council violated the procedural requirements of the Open Meetings Act on two occasions, May 2 and September 1, 2005. Attached to the complaint were three e-mail communications, originally sent by a member of the Council, on which the complaint relied as evidence of violations of the Act.<sup>1</sup> The second complaint alleged that the Council met on March 31, 2006, without providing adequate notice as required by the Act.

This opinion reviews both complaints. For the reasons explained below, we conclude as follows: The Open Meetings Act applied to the Council’s meetings on May 2 and September 1, 2005. Both meetings were permitted by exceptions within the Act to have been closed. However, at the September 1 meeting, the Council violated the Act by discussing topics beyond the exception that justified closing the meeting. In addition, the evident failure to follow the Act’s procedural requirements on May 2 was a violation. As to the September 1 meeting, we find that certain of the Act’s procedural requirements were met, but we cannot tell if there was full

---

<sup>1</sup>The letter concerning the May 2 and September 1 meetings, referring to a comment in one of the e-mails, asked us to investigate a “ton of illegal closed meetings.” This exceedingly broad allegation, lacking supporting detail, did not itself qualify as a complaint. *See Compliance Board complaint procedures*, <http://www.oag.state.md.us/Opengov/Openmeetings/Complaint.htm>. Thus, when the complaint was submitted to the Council for a response, the Council was advised that it need not address this allegation. The complaint invited us to talk to Council Vice-President Mary McCarthy to learn more. The Act, however, confines the Compliance Board to established complaint procedures and does not grant the Board investigative powers for the independent collection of evidence.

The complaint also suggested that the State’s Attorney may have participated in an improperly closed meeting. The State’s Attorney, however, is a single official not subject to the Act.

compliance. Finally, we find that the Council's notice of its meeting on March 31, 2006, complied with the Act.

**I**

**May 2, 2005 Meeting**

***A. Complaint***

The first allegation involves a closed session on May 2, 2005, at which a quorum of the Council met in the office of the State's Attorney for Queen Anne's County. The complaint alleged that the Council failed to comply with the procedural requirements of the Act: "There is no record of this closed meeting that I can find. There was no announcement or vote in an open session nor was it reported to have occurred in any following session." The complaint further noted that no minutes were taken.

***B. Response***

In a timely response on behalf of the Council, Stephen H. Kehoe, the attorney for the Town, indicated that the May 2 meeting at the State's Attorney's office was called by the State Prosecutor as part of an investigation then under the State's Prosecutor's jurisdiction. The Council's position is that the meeting was an executive function, in that it involved the administration of State law and did not fall under any of the Act's other defined functions; therefore, the Council argued, the Open Meetings Act did not apply.

Given this characterization of the meeting, we infer that the Council did not invoke any of the Act's procedures prior to closing the meeting or in its aftermath. Certainly, the response did not suggest that the Council had done so.

***C. Analysis***

If the May 2 session did involve an executive function, neither the substantive provisions nor the procedural requirements of the Open Meetings Act would have applied. § 10-503(a)(1)(I).<sup>2</sup> Of course, the Council's conclusory statement that the session involved an executive function does not make it so.

---

<sup>2</sup>All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

An “executive function” is defined as follows:

- (1) “Executive function” means the administration of:
  - (i) a law of the State;
  - (ii) a law of a political subdivision of the State; or
  - (iii) a rule, regulation, or bylaw of a public body.
  
- (2) “Executive function” does not include:
  - (i) an advisory function;
  - (ii) a judicial function;
  - (iii) a legislative function;
  - (iv) a quasi-judicial function; or
  - (v) a quasi-legislative function.

§ 10-502(d). As we have frequently recited, determining whether a matter constitutes an executive function involves a two-part analysis. We first ask whether the topic of discussion falls within the definition of any other defined function. If it does, the analysis is over, because an executive function “does not include” a topic within another function. If the topic is not within another defined function, we then ask whether it involved “the administration of” existing law. If not, it cannot be an executive function. *See, e.g., 5 OMCB Opinions 7, 8 (2006).*<sup>3</sup>

Implicit in the second step are two subsidiary points: there must be an identifiable prior law to be administered, *and* the public body holding the meeting must be vested with legal responsibility for its administration. If either is not true, the public body is not engaged in the function of administering law, as required by the definition. 4 *OMCB Opinions* 163, 165 (2005). That opinion involved a responsibility (filling a school board vacancy) vested by law solely with the Governor. The school board itself, we held, was not engaged in an executive function when it met to discuss its process for making recommendations to the Governor. As we put it, “While it is entirely reasonable for the Governor to solicit input from the County Board in making his decision, the County Board could identify no responsibility assigned by law to *it* that it was administering [at the meeting].” 4 *OMCB Opinions* at 166.

Accepting the Council’s explanation the May 2 session did not involve an advisory or other defined function, we nevertheless are at a loss to understand what law *the Council* was administering. Although not explicitly addressed in the Council’s response, based on the information provided in connection with a

---

<sup>3</sup>A topic may not fit within the executive function exclusion, in that it may not involve the administration of existing law, nor fall within any of the other defined functions. “If a discussion fits within none of the functional definitions of the Act, then the discussion is subject to the Act.” 1 *OMCB Opinions* 96, 98 (1994).

subsequent meeting on September 1, 2005, it would appear that the Council's position is that its discussions at the State's Attorney's Office on May 2 involved suspected criminal activity, namely, the mishandling of Town funds. Although the Town Council surely has a legitimate interest in protecting the Town's assets, the Council does not "administer" the State's criminal laws. Thus, it cannot rely on the executive function as a basis for avoiding application of the Open Meetings Act.

In reaching this conclusion, we are not insensitive to the fact that a public body's discussions with prosecutors concerning possible criminal activity are not normally fit for public observation.<sup>4</sup> That is why the Open Meetings Act specifically allows a public body to close a meeting to the public to "conduct *or discuss* an investigative proceeding on actual or possible criminal conduct." § 10-508(a)(12). This exception within the Act, however, like all of the others, may be invoked only if the public body complies with the procedural requirements of the Act. The Centreville Town Council evidently did not do so on May 2, and this was a violation.

## II

### **September 1, 2005 Meeting**

#### ***A. Complaint***

The complaint alleged that the Council violated the Act on September 1, 2005 when, following the completion of a closed session at which all three Council members participated (and about which no complaint is lodged), two members of the Council, constituting a quorum, remained and had a meeting with the Town Manager. According to the complaint, the latter session lasted at least 15 minutes. According to an attached e-mail from Vice-President McCarthy, she left the meeting at 9:00 and did not know "how long they were there past that."

#### ***B. Response***

The Council indicated that the September 1 meeting described in the complaint was a properly closed session involving a personnel matter. The subject of the meeting was the possible misappropriation of funds by an employee of the Town and the Town Attorney's advising the Council about the future course of the investigation by the State's Attorney. According to the response, a notice had been posted indicating there would be a closed meeting. A copy of the minutes, with identifying information concerning any person suspected of criminal activity redacted, was

---

<sup>4</sup>We assume that, as a practical matter, most such discussions occur with individual members of a public body or groups consisting of less than a quorum. Under these circumstances, the Act does not apply, because no "meeting" of the public body is convened.

provided with the Council's response. The minutes indicate that Vice-President McCarthy was in attendance.<sup>5</sup>

Although the meeting was evidently closed as a personnel matter, the Council's position is that it involved an executive function, that is, the administration of a State law, in that the Council was discussing the referral of a case of suspected theft to the State's Attorney.<sup>6</sup>

**C. Analysis**

**1. Executive function**

While the Council indicated why it believes the session involved an executive function, *i.e.*, the "reporting of a theft," for the reasons explained in Part IIC above, a municipal governing body cannot rely on a State criminal statute as a basis for invoking the executive function exclusion.<sup>7</sup>

**2. Personnel Matter**

We turn to the original basis for closing the meeting, *i.e.*, that it involved a specific personnel matter, allowing closure of the session under § 10-508(a)(1). The redacted minutes indicate that discussion involved a proposed investigation of an alleged mishandling of Town funds by someone who apparently was a Town employee. Because the employee was named during the course of these discussions, it is clear that the session could be appropriately closed as a personnel matter. The record shows that there was a motion to close the session under § 10-508(a)(1), and minutes were obviously kept. Furthermore, according to the response, notice of the closed session was duly posted. Unfortunately, the Council did not address whether the written documentation required to be completed in advance of a closed session and the post-session reporting of a closed session as part of publicly-available minutes were done. *See* §§ 10-508(d)(2)(ii) and 10-509(c)(2). If these steps were

---

<sup>5</sup>The Council acknowledged that the e-mail included with the complaint indicated Ms. McCarthy had arrived home ten minutes before the meeting reportedly adjourned; however, according to the response, Ms. McCarthy no longer has any specific recollection of when she got home.

<sup>6</sup>In support of the contention that the activity involved an executive function, the Council cited *Scull v. Montgomery County Citizens League*, 249 Md. 271, 281-284, 231 A.2d 92 (1968). *See* note 7 below.

<sup>7</sup>The Council's reliance on *Scull v. Montgomery Citizens League* is misplaced. This case may be taken as recognizing that a single body can serve in both a legislative and administrative capacity. The case was decided long before enactment of the Open Meetings Act, however, and certainly cannot be understood to deal with the scope of the executive function exclusion under the Act.

omitted, the procedural requirements of the Act were violated. Lacking sufficient information on this point, however, we express no opinion.

***3. Discussion beyond the stated topic***

While the Council was entitled to conduct a closed session about a personnel matter, it is obvious that discussion extended to other matters. The minutes reflect that discussion during the closed session included a proposed annexation as well as the effect on the budget of rising gas prices. To the extent discussion extended beyond the personnel matter that was the basis for the closed session, the Council violated the Act. "A public body that meets in closed session under this section may not discuss or act on any matter not permitted under subsection (a) of this section." § 10-508(b). *See 3 OMCB Opinions* 61, 64 (2000) (Opinion 00-14).

**III**

**March 31, 2006 Meeting**

***A. Complaint***

The second complaint alleged that the Council met on March 31, 2006, at 4:00 p.m., without providing adequate notice of the meeting. According to the complaint, this meeting followed a Council meeting the previous day during which two Council members seemed reluctant to consider contracts for the then-Town manager to continue providing certain services and for the employment of a new Town manager. Instead, a decision was made to postpone discussion to a later time. Apparently, notice was posted around 1:00 p.m. on March 31, advising the public of the meeting later that afternoon, during which the contracts were approved. The complainant assumed that the press were not notified since, according to the complaint, no representatives of the press were present during the March 31 meeting. The complaint also indicated that the notice was removed from the Town bulletin board by close of business the same day.

***B. Response***

On behalf of the Council, Mr. Kehoe timely provided a separate response to the second complaint. According to the response, during a closed meeting on March 30, the Council discussed certain changes in the proposed contract for Mr. Robert McGrory, the individual selected to be the Town's new manager, and directed Mr. Kehoe to incorporate the changes into the agreement so that it could be signed the next day, assuming that Mr. McGrory was agreeable. The revised contract was sent to Mr. McGrory by electronic mail on March 31 at 12:24 p.m. According to the Council's response, "notice was posted promptly after it appeared the parties had reached a meeting of the minds, which was as soon as was practically possible." Concerning notice to the press, the response noted that a reporter for the *Record*

*Observer* was present immediately before the meeting at a reception for the former Town manager. As to the posting period, the response noted that there is no obligation to continue posting a notice once a meeting has concluded.

***C. Analysis***

It is clear from both the complaint and the response that public notice of the meeting on March 31 was short. However, the Open Meetings Act does not prescribe a minimum amount of notice. Rather, it requires a public body to give “reasonable advance notice” of a meeting. § 10-506(a). What is “reasonable” depends on the facts.

Given the Council’s explanation that the meeting could not be officially scheduled until the terms of the draft contract were approved by Mr. McGrory, we conclude that the timing of notice was not unlawful. Notice was posted promptly after it was thus known that the meeting would go forward. And as the Council rightly points out, there is no requirement under the Act that notice remain posted following conclusion of a meeting.

**IV**

**Conclusion**

We hold as follows:

- The Open Meetings Act applied to the Council’s meetings on May 2 and September 1, 2005.
- The May 2 meeting was within an exception justifying closed-session discussion of criminal investigations, but the procedures to invoke the exception and other procedural requirements of the Act were not followed.
- The September 1 meeting was permissibly closed under the exception for specific personnel matters.
- Most of procedural requirements of the Act were followed in connection with the September 1 meeting. However, we express no opinion whether there was full compliance.
- The Council violated the Act at the September 1 meeting by discussing topics beyond the exception that justified closing the meeting.

- The Council's notice of its meeting on March 31, 2006, complied with the timing requirements of the Act.

OPEN MEETINGS COMPLIANCE BOARD

*Walter Sondheim, Jr.*  
*Courtney J. McKeldin*  
*Tyler G. Webb*